

ADMINISTRATION TEAM

January 13, 2017

9:00 am

WSDOT Fife Project Office

6610 16th Street E., Suite A

Fife, WA 98424

OPEN MEETING

Reviewed the last meeting summary for posting.

Guests: Jason Nakamura, President, 1 Alliance Geomatics

New Team Member

Shane Spahr is our new member replacing the vacancy created by Aleta Borschowa's resignation from the team due to her workload. Shane has been with WSDOT since 1999 in the Northwest region Mt. Baker area. Shane's office delivers both design and construction projects and the current focus is on fish barrier removal projects.

Annual AGC/WSDOT meeting

- The E-construction topic appears to have triggered good discussions at all tables during the breakout session and the members would like to follow up on the feedback collected at a future meeting. Chris Tams led the presentation and he will share the information after finalizing the information.
- The Partnering and Conflict Resolution presentation by Renee Hoekstra touched some important subjects such as the use of the "ladder" to escalating the issue at an appropriate time while understanding the ladder may look different for each contractor. The schedule of the upcoming 12 training sessions statewide will be disseminated as soon as they have been finalized with AGC.

Construction Contract Notice and Claim Procedures, Request to modify claim waiver language

- APWA owners received a letter from AGC requesting modification of the claim waiver language, which is within WSDOT's Standard Specification. These letters were sent directly to at least four local agencies and not to WSDOT or APWA.
- This issue is not new and AGC members have issues with some owners using the absence/tardiness of the notice requirements to get out of payments to contractors. The letter was the follow up attempts to work with some of these owners directly to avoid harsh or unfair behaviors and when it failed, this letter was drafted to work with lawmakers. Standard Specification language is viewed as straightforward, however some owners are including additional provisions that make the notification procedures very difficult and contractors do not feel they are treated fairly or some instances they are not paid for the additional work.

- The intent of the letter was not to address the language in the Standard Specifications but to address issues the contractors have with those owners (school districts, water & sewer districts and others) who include provisions that are much more restrictive. The owners use the more restrictive notification process to not pay contractors based on absent/tardiness of the notifications.
- One suggestion was to use the Dispute Resolution Board (DRB) claims (Standard Specifications) process for some of these small owners to allow the construction industry experts to assist in resolving claims prior to reaching the highest levels.

Project Schedule Minimum Bid

WSDOT recently had to reject a low bidder as the result of a contractor not filling out the minimum bid in the proposal and the contractor's DBE commitment had a very low margin above the goal amount. When the minimum bid amount was added into the total bid amount, the contractor did not meet the minimum DBE goal amount. This resulted in awarding the contract to the second bidder.

The minimum bid was created to provide a tool for the owners when the contractor is not responsive in submitting the project schedule and updates. A suggestion was made to list the minimum bid amount in the bid item description so the bidders will not likely to miss the minimum amount when filling out the proposal.

FHWA's waiver on DBE firms owned by non-minority women

John shared the approved waiver from FHWA for non-minority women DBE as the result of the previous disparity study completed by WSDOT in 2013. The study found there were no disparities between availability and utilization, and they will be excluded from consideration toward meeting the contract goals.

The waiver does not mean non-minority owned DBE firms will be excluded from the DBE program but their participation is considered race neutral and will count towards WSDOT's overall annual DBE goal.

No decision has been made to implement the waiver at this time as there is a lot of work to be done in updating the directory, specifications, reporting system, and training as necessary. WSDOT is in the process of evaluating the level of efforts and the time necessary to implement the waiver requirements.

- Members expressed interest in more guidance in documenting Good Faith Efforts for bidding as well as at the end of the contract. John offered his willingness to work with a small group.
- It was mentioned to John that many contractors are paying a premium to obtain DBE services. The team was asked to provide evidence of DBE subcontractor quotes that are significantly higher as compared to quotes received from non-DBE subcontractors. John would like collect this information and have a conversation with FHWA in determining or establishing criteria that helps determine what is a reasonable amount to pay for DBE services versus non-DBE services. This will allow a contractor to fill out a GFE instead of paying the premium price for the work and still be considered for a contract award.

Reference Information

What sort of notification is needed, if any, when WSDOT places new information in the Project Reference Information Folder on the Contract Ad & Award web page? The reference information is

not part of the contract and it was created to provide design/CAD files for contractors to use to assist their efforts in developing their bid.

- Notification was not necessary as long as there is a cutoff date prior to bid opening
- Not many projects offer design/CAD files and contractors would like to see more projects offering these files

Schedule and location of future meetings:

Planned meeting dates for 2017 March 17, April 14, May 12, and June 9.

Meeting location: WSDOT Fife Project Office Conference room

December 2, 2016

**Re: Construction Contract Notice and Claim Procedures
Request to Modify Claim Waiver Language**

[REDACTED]

The organizations listed below are writing to request that you consider modifying certain language in your construction contracts. Your construction contracts contain strict notice and claim procedures that address contractor claims for additional compensation or time on your projects. Your contracts also state that if the contractor fails to comply with these strict procedures, its claim is waived regardless of whether the contractor's claim has merit or whether your organization has been harmed by the late notice. All of this matters because of a Washington supreme court decision known as *Mike M. Johnson v. County of Spokane*, which essentially holds that these clauses are enforceable and if a contractor fails to comply with them, the contractor's claim is waived. The following are a few reasons why this issue should be important to you.

Strict notice and claim procedures are causing escalating costs of construction. Not only must a contractor perform the work in accordance with the plans and specifications, but it now must keep track of a set of deadlines, which vary between public owners, and submit various written notices, appeals, and claims that require significant time and energy. This causes added staff time and overhead for general contractors performing work on public projects. Without any other way to recoup those costs, general contractors have no choice but to increase their bids and unit prices to account for the added overhead necessary to comply with notice and claim procedures. These additional costs are particularly burdensome to small general and subcontractors, many of whom are minority and women-owned businesses. Public owners should consider these facts in deciding whether to revise their contractual notice and claim procedures.

Compliance deadlines are often times impossible to meet. The *Mike M. Johnson* case, opens the door for compliance requirements regardless of whether they can be met by the contractor. Assessing the impact of changes – either those requested by an owner or mandated by unforeseen site conditions – on a complex construction project often cannot be performed within the short deadlines contemplated by the contract. One issue in a project can impact multiple systems, and the cumulative impact takes time to calculate. Strict contractual notice and claim procedures are a one size fits all approach that are impossible to comply with in every case.

Notice and claim procedures are enforced even if the public owner has not been harmed by the late notice. The *Mike M. Johnson* case does not require any showing from a public owner that they were harmed by the contractor's late notice or failure to comply with the notice and claim procedures. The end result is that a contractor can lose its right to a claim for additional compensation or time when the contractor should rightfully be paid for the out of

December 2, 2016

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scope work, even if the public owner has suffered no hardship by the late notice. This creates an inequitable result and an unjust windfall for public owners.

Given the above concerns, we request that you modify your contracts on future projects to provide that the notice and claim procedures are only enforceable to the extent that the public owner has been prejudiced by the late notice from the contractor. It is important to note that the University of Washington and the State Department of Enterprise Services – two of the largest state public agencies – already provide for this remedy in their contracts.

The specific language that we request that you add to your construction contracts is as follows:

Notwithstanding the foregoing, any clause in this contract which purports to waive, release, or extinguish the claim rights of Contractor to damages or an equitable adjustment based on failure to submit claim notice or claim related documentation in a specified time frame or form is void and unenforceable, except to the extent that the Owner seeking to enforce such clause is able to show material prejudice as a result of noncompliance.

Thank you for your consideration of this matter. Please kindly respond by Dec. 31, 2016. Please direct questions or correspondence to Jerry VanderWood, AGC of Washington, 410 11th Ave SE #203, Olympia, WA, or 360-352-5000, email jvanderwood@agcwa.com.

Very truly yours,

David D'Hondt
Executive Vice President
Associated General Contractors (AGC) of Washington

Dave Gent
Executive Director
Washington Asphalt Pavement Association (WAPA)

Frank Lemos
President
National Minority Business Advisory Council

Scott Middleton
General Counsel
Mechanical Contractors Association (MCA) of Western Washington

Wendy Novak
President/CEO

December 2, 2016

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Associated Builders and Contractors (ABC) of Western Washington

Mike Pellitteri

President

National Utility Contractors Association—Washington Chapter (NUCA WA)

Barry Sherman

Executive Director

National Electrical Contractors Association (NECA) Puget Sound Chapter

Cheryl Stewart

Executive Director

Inland Northwest Associated General Contractors (AGC)

ADMINISTRATION TEAM January 13, 2017 Sign In Sheet

Attending	Name	Representing	Phone (Office)	Phone (Cell)	Email
<i>TRB</i>	Jerry Brais	King County	206-477-3614	425-681-7489	jerry.brais@kingcounty.gov
<i>JMB</i>	Jay Byrd	1 Alliance Geomatics	425-502-8171	425-628-0643	Jay.byrd@1-alliance.com
<i>CR</i>	Corey Christensen	KLB Const.	425-297-9313	206-949-3569	coreyc@klbconstruction.com
<i>JC</i>	John Cichosz	Tappani Const.	360-687-1148	360-907-9632	johnc@tapani.com
<i>JD</i>	Jon Deffenbacher	WSDOT OR	253-365-6700	253-820-3816	jon.deffenbacher@wsdot.wa.gov
<i>BD</i>	Brandon Dully	Guy F. Atkinson	425-255-7551	206-786-1244	Brandon.Dully@atkn.com
<i>SK</i>	Brandon Dully Earl Keye <i>SKAN HUFF</i>	WSDOT, OEO	360-705-7095		Keye@wsdot.wa.gov
	Jeret Garcia	Valley Electric	360-840-3222	425-322-7415	jeretg@velectric.com
<i>QG</i>	Quinn Golden	GRANITE INC.	425-551-3100	425-328-7257	Quinn.golden@gcinc.com
<i>MH</i>	Mike Hall	Tucci & Sons	253-922-6676	253.377.6204	mph@tucciandsons.com
<i>JH</i>	Jeff Horton	FHWA	360-753-9411		Jeff.Horton@dot.gov
	Craig McDaniel	WSDOT HQ	360-705-7823	360-791-1611	craig.mcdaniel@wsdot.wa.gov
<i>KRM</i>	Kyle McKeon	WSDOT LP	360-705-7375		mckeonk@wsdot.wa.gov
<i>WN</i>	Tina Nelson	APWA Div 1 (Kitsap County)	360-337-4891	360-710-4740	knelson@co.kitsap.wa.us
<i>LS</i>	Mark Scoccolo	SCI Infrastructure	206-242-0633	206-730-5289	mark@scinfrastructure.com
	Chad Simonson	WSDOT ER	509-324-6252	509-844-6485	simonsc@wsdot.wa.gov
<i>SS</i>	Shane Spahr	WSDOT NWR	360-757-5856		shane.spahr@wsdot.wa.gov
<i>DT</i>	Denys Tak	WSDOT HQ	360-705-7833	360-269-5007	denys.tak@wsdot.wa.gov
	Chris Tams	WSDOT, SWR	360-905-2005	360-624-6202	tamsc@wsdot.wa.gov
<i>GW</i>	Greg Waugh	Max J. Kuney Const.	509-535-0651	206-730-9964	GregW@MaxKuney.com
<i>J</i>	<i>Jason Nakamura</i>	<i>1 ALLIANCE GEOMATICS</i>	<i>425 502 8171</i>	<i>425 829 8826</i>	<i>jason.nakamura@1-alliance.com</i>

ADMINISTRATION TEAM

February 17, 2017

9:00 am

WSDOT Fife Project Office

6610 16th Street E., Suite A

Fife, WA 98424

OPEN MEETING

Reviewed the last meeting summary for posting.

Excellence in Contract Administration Award

WSDOT has seen a decrease in the number of applications received over the recent years and would like some input in how to proceed. Something we are considering to increase participation is to discontinue the award as well as to make improvements regarding the notifications/reminders being sent out to WSDOT project engineers as well as contractors. WSDOT project engineers and contractors has to initiate and collaborate in submitting their applications in order to be successful. Relying on WSDOT project engineers is not working as they are quick to move on to their next projects.

- Consider using a different cut-off date to include projects that are finishing up later in the season. Otherwise, these projects do not get any interest in the following year to apply for the award.
- Would like to see increased participation or application interest by contractors.
- WSDOT can do a better job of sending out the reminder to region's construction engineers and project engineers.
- Members would like to see the continuation of rewarding good partnership by keeping this award.
- May be able to work with AGC to disseminate the reminder to contractors.
- Should consider applying for this award as part of the preconstruction conversation on all projects.
- Be flexible in the award categories to allow for special projects such as fish passage and other unique contracts.
- Allow more than one contract for award when many project applications are submitted under a category.
- Consider a category for subcontractors to award their efforts in delivering projects.

Construction Contract Notice and Claim Procedures, Request to modify claim waiver language

WSDOT testified against the bill as written on February 7th and a meeting with lawmakers is scheduled next week to discuss changes to the language that may work for WSDOT and other owners.

WSDOT will be monitoring the status of this bill closely and will work with other owners as necessary to improve the language while addressing contractor's concerns.

Value Engineering Change Proposal

Greg led the discussion of Value Engineering Change Proposal (VECP) following up on the information discussed at the meeting in May 2016. Some of the recommendation and clarification needed should be considered in updating the VECP portion of the Construction Manual.

- WSDOT project engineers/regions can do more in encouraging VECP submittals whenever contractors approach them with a concept. Some members felt they received mixed messages when discussing potential VECP opportunities.
- By centralizing VECP proposals, WSDOT/Contractor would gain efficiency in ruling out VECPs that does not provide savings and encourage ones that are considered valuable. This should be done at the State Construction office.
- It is critical to involve the subject matter experts to evaluate the merits of a VECP to ensure anticipated savings, added contract time, and risks to make certain it is the right thing to do..
- Suspension of contract time to develop a VECP can increase WSDOT construction engineering charges and this cost must be considered when the savings are calculated.
- Consider allowing additional time to develop a complex VECP prior to the first chargeable working day. This suspension/delay of contract time period can vary from days to weeks and as long as this added time does not affect the contract critical seasonal work and/or over wintering the project.
- Some WSDOT Design Build (DB) contracts contain a mandatory 30 calendar day pause for the Practical Design Workshop. The VECP process should use a similar pause in Design Bid Build (DBB) contracts.
- Evaluate each VECP while considering the savings, schedule, staff time/labor impact, the design efforts already paid for in the contract.
- Identify items within the contract that can be deleted or off limits by VECP such as;
 - Shaft obstruction
 - Force Account work
 - Steel/material Escalation
 - Commitments made to stakeholders/community/permits
- Design risk/responsibility associated with the VECP must consider its impacts to other design work related to the VECP. Such as different bridge foundation VECP's impacts to substructure and superstructure design. It would help contractors to understand at the Concept Approval stage how much engineering is the responsibility of the VECP.
- How would encountering a changed condition as the result of the VECP be treated?
- What happens when the savings disappears or risks are greater than anticipated at the time of the Concept approval? Do we proceed, or stop, and who bears the costs when the VECP is stopped or discarded?
-

Schedule and location of future meetings:

Planned meeting dates for 2017 March 17, April 14, May 12, and June 9.

Meeting location: WSDOT Fife Project Office Conference room

Awards Presentation

The AGC/WSDOT Lead Team will contact the winning project team and present the **Partnership for Excellence in Contract Administration** awards during the Annual AGC/WSDOT Joint Meeting and the WSDOT Annual Statewide Project Engineer's Conference.

Application Package

Each Entry must include the following:

1. A single completed nomination form signed by both the Contractor and the Project Engineer.
2. A brief overview of the nominated project.

Note: The nomination may also be submitted via e-mail to:

gasched@wsdot.wa.gov or EricksD@wsdot.wa.gov.

"Partnership for Excellence in Contract Administration" Award

Project Name: _____
Contractor Name: _____
Project Engineer: _____
Date Project Accepted: _____

Category of Award (please circle one category)

Eastern Washington

- Project Less than \$3,000,000
- Project \$3,000,000 to \$10,000,000
- Projects Greater than \$10,000,000

Western Washington

- Project Less than \$3,000,000
- Project \$3,000,000 to \$10,000,000
- Projects Greater than \$10,000,000

Statewide

- Special mention City/County or Other Project Administered by the WSDOT/Contractor Team

Brief Overview of Nominated Project

Contacts

Dan Gasche WSDOT Construction Office (360)705-6970 gasched@wsdot.wa.gov	Dave Erickson WSDOT Construction Office (360)705-7833 EricksD@wsdot.wa.gov
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Jerry VanderWood
Associated General Contractors
(253)272-7725
jvanderwood@agcwa.com

WSDOT Applicant Team Signature

Contractor Applicant Team Signature

**Completed nomination form must be received on or before
October 31, 2016.**

Mail to:
Partnership for Excellence in Contract Administration Award
c/o Dan Gasche
Construction Administration Specialist
Washington State Department of Transportation
P.O. Box 47354
Olympia, WA 98504-7354
E-mail to:
gasched@wsdot.wa.gov

Partnership for Excellence in Contract Administration



**Girder Placement -
Pedestrian Bridge over Freya Street**

North Spokane Corridor

**2016
Recognizing Excellence in
Contract Administration
A Joint AGC/WSDOT Award**



Partnership for Excellence in Contract Administration

Award Nomination

“Recognize and encourage extraordinary achievement by the Contractor/WSDOT partnership responsible for delivering transportation projects in a timely, professional, and responsive manner while also considering the needs of others who are affected by the project.”

Key Elements

Key elements of effectiveness include a partnered atmosphere with empowered project team members who are able to recognize and overcome obstacles, initiate effective public involvement, maintain effective and open communication between all stakeholders, and streamline project administration where appropriate.

Eligibility

To be eligible for an award, the team’s accomplishments must be nominated for a project that has been “Accepted” by WSDOT in accordance with 1-05.12 of the *Standard Specifications* **on or before October 15, 2016**. In addition, those projects which have been granted Physical Completion by this date or have been granted Substantial Completion with only Plant Establishment work remaining, may be nominated provided both the Contractor and WSDOT team leaders state on the nomination form that there are no outstanding unresolved issues.

Determination of Western Washington/Eastern Washington will be based upon the Region boundaries of the Region in which the physical work took place.

Projects completed before October 15, 2016, may be submitted as soon as they meet the eligibility requirements shown above. The WSDOT Construction Office will keep them on file until the time of final judging.

Evaluation Criteria

The following are the six (6) criteria categories for the **Partnership for Excellence in Contract Administration** awards. Each category will be weighted 100 points each for a total of 600 points possible.

Customer-Focused Administration

- Effectively mitigates impacts to the public, adjacent businesses, and residents.
- Employs an effective public involvement program.
- Effectively communicates the project and its impacts with stakeholders and customers.
- Establishes effective means for community recognition of the project, the difficulties the project faces, the team’s efforts and successes in overcoming challenges.

- Effective use of subcontractors and/or resource support groups.

Innovative Problem Solving

- Extraordinary obstacles overcome in the delivery of the project.
- Extraordinary coordination and/or cooperation with other work on or adjacent to the project.
- Disputes that are resolved to the benefit of all parties and customers.
- A team that is focused on outcomes rather than processes and utilizes an effective disputes resolution process.
- Upon submittal of a nomination, there are no outstanding disputes.
- The speed at which problems are resolved or the ease of their resolution.

Overcoming Extraordinary Challenge

- Emergency contracting.
- Special or unique features that were encountered.
- Use of unique construction methods.
- The team’s ability to overcome adversity.
- Something extraordinarily different about this project than work on an adjacent project or previous efforts.
- A uniqueness of the project itself or some aspect of implementing or delivering the project.

Effective Contract Administration

- Effective administration of change orders.
- Materials Documentation requirements that are provided early.
- Materials Documentation that is received with the material prior to installation.
- The Region’s ability to manage and certify materials used in a timely manner.
- Timeliness of the project’s materials and other required contract paperwork.
- Shop drawings and other submittals are provided early and are complete.
- Ability to close project in a timely manner, all Affidavits of Wages Paid are submitted.
- Open and frank Contractor PE evaluations indicating good performance.
- Effective assistance provided to each other in support of these goals.

Timely Completion of Project

- All aspects of the work are completed in a timely manner, from paperwork to project completion.
- Prompt submittal and effective use of project schedule.
- Environmental issues are effectively addressed.
- Compliance with labor requirements by both the Prime Contractor and subcontractors. (Wages, DBE, MWBW, Apprentice)
- The progress of work is enhanced in some manner.
- Effective or innovative management of traffic in an effort to reduce impacts and expedite project completion.

Safety

- Employs effective worker safety.
- Employs effective protection of the public’s safety.
- Effectively uses the various safety tools and devices available.
- Effective measurement and responsiveness to accidents occurring on the project, both internal project personnel and external accidents involving the public.

Selection Process

All nominations must be received **on or before October 31, 2016**. A representative from the Project Office and the Contractor must be available for the interview.

A panel of impartial judges will interview (by phone) all nominated teams for the category submitted. However, at the panel’s discretion, and upon review of the nominations submitted, a decision may also be reached to forego an award altogether for a particular category. The seven (7) categories are listed on the reverse of this form.



Nomination Form 2016

**“Partnership for Excellence in Contract Administration”
Award**

Contract Number: _____

Project Name: _____

Contractor Name: _____

Project Engineer: _____

Date Project Accepted: _____

Category of Award (*please underline one category*):

Eastern Washington

- Projects Less than \$3,000,000
- Projects \$3,000,000-\$10,000,000
- Projects Greater than \$10,000,000

Western Washington

- Projects Less than \$3,000,000
- Projects \$3,000,000-\$10,000,000
- Projects Greater than \$10,000,000

Statewide

- Special Mention City/County or Other Project Administered by the WSDOT/Contractor Team
-



Brief Overview of Nominated Project



WSDOT Applicant Team Name (Please Print)

WSDOT Applicant Team Signature

Contractor Applicant Team Name (Please Print)

Contractor Applicant Team Signature

Completed nomination form, overview, narrative, and any other appendices must be received on or before October 31, 2016.

Mail to: Partnership for Excellence in Contract Administration Award
c/o Dan Gasche
gasched@wsdot.wa.gov
(360) 705-6970
Washington State Department of Transportation
P.O. Box 47354
Olympia, WA 98504-7354



ADMINISTRATION TEAM February 17, 2017 Sign In Sheet

Attending	Name	Representing	Phone (Office)	Phone (Cell)	Email
<i>JB</i>	Jerry Brais	King County	206-477-3614	425-681-7489	jerry.brais@kingcounty.gov
<i>MB</i>	Jay Byrd	1 Alliance Geomatics	425-502-8171	425-628-0643	Jay.byrd@1-alliance.com
<i>JC</i>	Corey Christensen	KLB Const.	425-297-9313	206-949-3569	coreyc@klbconstruction.com
	John Cichosz	Tappani Const.	360-687-1148	360-907-9632	johnc@tapani.com
	Jon Deffenbacher	WSDOT OR	253-365-6700	253-820-3816	jon.deffenbacher@wsdot.wa.gov
	Brandon Dully	Guy F. Atkinson		206-786-1244	Brandon.Dully@atkn.com
	Earl Key	WSDOT, OEO	360-705-7095		Keye@wsdot.wa.gov
<i>JB</i>	Jeret Garcia	Valley Electric	360-840-3222	425-322-7415	jeretg@velectric.com
<i>Q</i>	Quinn Golden	GRANITE INC.	425-551-3100	425-328-7257	Quinn.golden@gcinc.com
	Mike Hall	Tucci & Sons	253-922-6676	253.377.6204	mph@tucciandsons.com
<i>JLH</i>	Jeff Horton	FHWA	360-753-9411		Jeff.Horton@dot.gov
	Craig McDaniel	WSDOT HQ	360-705-7823	360-791-1611	craig.mcdaniel@wsdot.wa.gov
	Kyle McKeon	WSDOT LP	360-705-7375		mckeonk@wsdot.wa.gov
	Tina Nelson	APWA Div 1 (Kitsap County)	360-337-4891	360-710-4740	knelson@co.kitsap.wa.us
<i>MS</i>	Mark Scoccolo	SCI Infrastructure	206-242-0633	206-730-5289	mark@scinfrastructure.com
	Chad Simonson	WSDOT ER	509-324-6252	509-844-6485	simonsc@wsdot.wa.gov
<i>SS</i>	Shane Spahr	WSDOT NWR	360-757-5856	<i>360-720-1431</i>	shane.spahr@wsdot.wa.gov
<i>DT</i>	Denys Tak	WSDOT HQ	360-705-7833	360-269-5007	denys.tak@wsdot.wa.gov
<i>CT</i>	Chris Tams	WSDOT, SWR	360-905-2005	360-624-6202	tams@wsdot.wa.gov
<i>GW</i>	Greg Waugh	Max J. Kuney Const.	509-535-0651	206-730-9964	GregW@MaxKuney.com
	<i>REGGIE WAGEMAN ATKINSON</i>			<i>425-757-2713</i>	<i>reggie.wageman@atkn.com</i>

ADMINISTRATION TEAM

March 17, 2017

9:00 am

WSDOT Fife Project Office

6610 16th Street E., Suite A

Fife, WA 98424

OPEN MEETING

Reviewed the last meeting summary for posting.

WSDOT DBE Overall annual goal

John shared that when the overall annual goal is achieved three years in a row, the program will switch to voluntary (race neutral) participation on all contracts to achieve the annual overall goal. For the first time in the last 11 years, WSDOT is achieving the overall annual goal. OEO is taking a closer look at the non-Condition of Award (COA) DBE participation also known as race conscious participation to look for opportunities to lowering the contract COA goals. Some issues as we move towards achieving the overall annual goal for the next two years is;

- No more DBE Utilization Certification form and the Written Confirmation forms due at the time of bid opening
- Race neutral participation will continue to be tracked by reporting via B2GNow, the same way as how contractors are reporting and WSDOT verifies the data and conducts On-site reviews.
- Less bid rejection as the result of DBE form information issues between bid opening and award.
- This does not solve the contractors need to receive competitive DBE subcontract bids in order to be a low bidder. The voluntary DBE program will likely experience less participation as the result of the low bid contracting method.
- Contracts may result in a combination of a lower COA goal (using multiplier) and higher reliance on the voluntary reliance on the DBE participation.
- OEO must carefully consider the competitiveness necessary for each of the contractors at the time of bidding.
- Not all DBE subcontractors can compete with non-DBE subcontractors without the COA contract requirements: This is a reality.
- Would the OEO program track contractors providing Good Faith Efforts at the time of bidding when DBE subcontractors are not reasonably competitive with their quotes?
- The time line for reverting to a COA contract goal when the voluntary participation is not tracking to achieve the overall annual goal was not clear at this time. Either a new disparity study must be conducted or an immediate return to using COA contract goals will be used.
- Not having some sort of DBE requirements in federal aid contracts is not an option in the near future.

- DBE subcontractors must get to a point where they can be competitive with others in order for the reliance of voluntary DBE programs to succeed.
- There is a definite need for clear written guidance on the minimum acceptable information necessary on the Good Faith Efforts at the time of bidding. Also a written guidance on what is a reasonable amount of premium to pay for the DBE participation before relying on the GFE instead is also needed.
- It was suggested that the program must look more critically on the availability of DBE subcontractors per project and location.

Mike M. Johnson Legislation – Tamarah Knapp Hancock

Tamarah shared the Support the Fairness in Contracting Act HB 1574 information sheet, Draft Mike M Johnson Legislation and the Senete bill 5788. Attached.

This bill tries to make parity between the consequences of when the contractor fails to do verses when the owner fails to do. When a contractor fails to provide a required notice within the 14 days, they waive their rights for the payment of the work and they have no way to recover. In addition, the contractor has an obligation to complete the changed work. When an engineer fails to provide a required notice within the 14 days, there is no consequential damage. In reality, both of these situations are a breach of the contract.

The goal of the legislation is to shift the burden to the contractor to show that the owner was not prejudiced by the contractor's failure to follow the claim notice provisions in the contract prior to obtaining an equitable adjustment for the claim.

- The bill did not survive the legislation process.
- Goal is to work with owners and AGC to develop a language that can achieve the language that achieves this parity. See attached specifications highlighted areas for potential edits.
- Department of Enterprise Services provided edits and supported the bill.
- Changes are a reflection of how WSDOT behaves in most contracts.
- Smaller owners tend to exercise the strictest terms of the contract and often the damages are mostly, if not always felt by the contractor.
- Consider changes in Standard Specifications in section 1-04.4 last sentence: omit "completely" and insert "to the extent the owner was prejudiced" at the end of the sentence.
- Because of the WSDOT's consistent and predictable behavior of how these requirements are applied, they are enjoying the competitive contracts.
- Some owners use these technical requirements as leverage and sometimes use it to discount change work completed.

E-Construction Update – Chris Tams

Chris shared the E-construction presentation shared at the AGC/WSDOT annual meeting.

- WSDOT has a few people working on a funding package to convert towards E-construction in all aspects of the construction business.
- By incrementally converting by defined business phases, we should avoid a complete failure of the system or provide an opportunity to revert to the old way if that phase conversion fails.

- AGC has to be a partner and a proponent of the E-construction conversion for WSDOT to succeed.
- WSDOT is not looking at a program that is specifically customized for its own business model. Instead, it's looking at a proven program already being used by owners across the country with a similar business needs.
- Chris will keep the team updated on the progress.
- Most members supported the effort to convert to E-construction by WSDOT.

2018 Standard Specifications – Electronic copy

WSDOT is considering a move towards stop printing Standard Specifications book. Possibly this upcoming 2018 book.

- Smaller subcontractors are not ready to go electronic copy.
- Larger contractors are already using ipads and tablets but many still use the book in the field.
- Some areas in the State do not have an internet coverage to download the book.
- Most office staff are using the electronic copy due to ease of use and the searchable functions.
- Smaller agency staff do not currently have the hardware to make this switch.
- Allowing a couple of years of notice to change over will work better. Print 2018 and decide what to do in 2020 and notify all users.

Schedule and location of future meetings:

Planned meeting dates for 2017 May 12, and June 9.

Meeting location: WSDOT Fife Project Office Conference room



ADMINISTRATION TEAM March 17, 2017 Sign In Sheet

Attending	Name	Representing	Phone (Office)	Phone (Cell)	Email
	Jerry Brais	King County	206-477-3614	425-681-7489	jerry.brais@kingcounty.gov
JMB	Jay Byrd	1 Alliance Geomatics	425-502-8171	425-628-0643	Jay.byrd@1-alliance.com
in	Corey Christensen	KLB Const.	425-297-9313	206-949-3569	coreyc@klbconstruction.com
gr	John Cichosz	Tappani Const.	360-687-1148	360-907-9632	johnc@tapani.com
	Jon Deffenbacher	WSDOT OR	253-365-6700	253-820-3816	jon.deffenbacher@wsdot.wa.gov
	Brandon Dully	Guy F. Atkinson		206-786-1244	Brandon.Dully@atkn.com
	Earl Key	WSDOT, OEO	360-705-7095		Keye@wsdot.wa.gov
EG	Jeret Garcia	Valley Electric	360-840-3222	425-322-7415	jeretg@velectric.com
Qb	Quinn Golden	GRANITE INC.	425-551-3100	425-328-7257	Quinn.golden@gcinc.com
MPH	Mike Hall	Tucci & Sons	253-922-6676	253.377.6204	mph@tucciandsons.com
	Jeff Horton	FHWA	360-753-9411		Jeff.Horton@dot.gov
	Craig McDaniel	WSDOT HQ	360-705-7823	360-791-1611	craig.mcdaniel@wsdot.wa.gov
KRM	Kyle McKeon	WSDOT LP	360-705-7375		mckeonk@wsdot.wa.gov
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LB	Mark Scoccolo	SCI Infrastructure	206-242-0633	206-730-5289	mark@scinfrastructure.com
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	Shane Spahr	WSDOT NWR	360-757-5856		shane.spahr@wsdot.wa.gov
	Denys Tak	WSDOT HQ	360-705-7833	360-269-5007	denys.tak@wsdot.wa.gov
CHA	Chris Tams	WSDOT, SWR	360-905-2005	360-624-6202	tamsc@wsdot.wa.gov
GM	Greg Waugh	Max J. Kuney Const.	509-535-0651	206-730-9964	GregW@MaxKuney.com
	REGGIE WAGEMAN	ATKINSON		425-757-2713	reggie.wageman@atkn.com
	TAMARAH HANCOCK - SCARSELLA			253.740.7110	tamarah-ke@scarsella.com
			253.872.7173		
	JOHN HUFF	WSDOT	CALLED IN		

DRAFT MIKE M JOHNSON LEGISLATION

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1. A new section added to chapter 4.24 RCW to read as follows:

- (1) Any clause in a construction contract, as defined in RCW 4.24.370, which purports to waive, release or extinguish the claim rights of a contractor, subcontractor or supplier to damages or an equitable adjustment based on failure to submit claim notice or claim-related documentation in a specified time frame or form is void and unenforceable, except to the extent the party seeking to enforce such clause is able to show material prejudice as a result of non-compliance.
- (2) "Claim" for the purposes of this Section means any demand or assertion by a party to a construction contract seeking, as a matter of right, adjustment or interpretation of contract terms, payment of money, extension of time, or other relief with respect to the terms of the contract. The term "claim" includes other disputes and matters in question between the parties to a construction contract arising out of or relating to the contract. The responsibility to substantiate a claim rests with the claimant.
- (3) Subsection (1) of this Section does not apply to any contractual requirement that a lawsuit, arbitration or other similar alternative dispute resolution procedures be commenced within a reasonable time period, which shall be no fewer than one hundred eighty (180) calendar days following the completion or termination of a contract.

Effect Statement:

Shifts the burden to the contractor to show that the owner was not prejudiced by the contractor's failure to follow the claim notice provisions in the contract prior to obtaining an equitable adjustment for the claim.

1 AN ACT Relating to construction contracts; and adding a new
2 section to chapter 4.24 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. **Sec. 1.** A new section is added to chapter 4.24 RCW
5 to read as follows:

6 (1) A contractor, subcontractor, or supplier to a construction
7 contract, as defined in RCW 4.24.370, may be entitled to equitable
8 adjustment of a claim despite the failure to submit a claim notice or
9 claim-related document in a specific time frame or form required by
10 the contract, to the extent the interests of the person seeking to
11 enforce the notice are not prejudiced by the failure to comply with
12 the notice provisions.

13 (2) For the purposes of this section, "claim" means any demand or
14 assertion by a party to a construction contract seeking, as a matter
15 of right, adjustment, or interpretation of contract terms, payment of
16 money, extension of time, or other relief with respect to the terms
17 of the contract. "Claim" includes other disputes and matters in
18 question between the parties to a construction contract arising out

1 of or relating to the contract. The responsibility to substantiate a
2 claim rests with the claimant.

--- END ---

Support the *Fairness in Contracting Act* - HB 1574 -

The Issue

Historically, compensation for changes to a construction contract was based on fairness and merit. If circumstance changed on a complex project, a fair and equitable price adjustment to owners and contractors alike were worked out, with the focus on the merits of the effect the change had on the project.

Now, the merits of a claim can take a back seat to the technical procedures of how a contractor's claim is made. Miss a notice deadline – even if circumstances of the change make it impossible to meet the deadline – and the contractor's claim can be ignored. In the Mike M Johnson case, the State Supreme Court said contractors must strictly comply with contractual notice and claim provisions to preserve claim rights even if the owner knew of the unforeseen event, gave a go-ahead on the extra work and observed the work being done!

Because of Johnson, owners and contractors are pitted against each other, with contractors creating mounds of paperwork in an attempt to preserve their right to obtain compensation. If a contractor fails to do so, a trial court is no longer allowed to examine the facts of the claim; it must dismiss it, even if the owner was aware of the changed circumstance and approved the extra work.

Why it matters to the prime contractors

Contractors can be forced to absorb the full cost of extra work, or must settle for much less than equitable compensation due to contract technicalities which are often impossible to comply with. Assessing the impact of changes – those requested by an owner or mandated by unforeseen site conditions on a construction project – in many instances takes time. Most of them even require revised design direction from an architect or an engineer, areas that are the owner's responsibility and not covered by the construction contracts.

(continued...)

REV 1.30.17

The *Fairness in Contracting Act* is strongly supported by these organizations.



Construction projects are complicated. A single issue can impact multiple systems, trades, and/or tiers of contractors. The cumulative impact of a change takes time to evaluate. Often, a change or differing site condition requires a design modification from the architect or engineer. In short, construction contracts often do not allow for the necessary time to make a complete assessment of cost of time impact to file a claim within the timeframe mandated by the contract.

This creates a “gotcha” situation for the contractor and a potential windfall for the owner. As a result, several public owners have been incentivized to insert tough notice provisions in contracts that are difficult or impossible to meet.

Why it matters to small and disadvantaged businesses

The entities that get the brunt of the Mike M Johnson impact are small contractors that do not have enough staff to support a letter-writing campaign necessary to avoid a potential adverse ruling, should a problem materialize. These are also the contractors – many of whom are new minority-owned businesses – that are least likely to be able perform extra work required by an owner for free. Such procedural requirements are like another layer of regulation and create a barrier to entry of small businesses into the construction market.

Why it matters to labor

Every dollar spent on administration is one dollar less for construction workers. The Johnson decision dilutes money for construction. It means more money for administration and less money for building and well-paying construction jobs.

Impact on taxpayer dollars

Mike M. Johnson increases the cost of construction without a public benefit. To comply with onerous notice of claim and documentation requirements in some contracts, contractors often must hire additional staff to prepare impact analysis, schedule revisions and detailed cost estimates prior to sending notice letters for every potential issue, whether it materializes or not, and to do this repeatedly. Adding overhead to the cost of administering a construction contract does not get another foot of roadway or square foot of building built. Rather, it just drives up the cost for taxpayers. It also increases the cost and burdens on the owner’s side, because the consulting architect or engineer hired by the owner must now respond to each and every notice filing. It also creates a unnecessarily hostile and suspicion-filled work environment where people acting in good faith still need to endlessly document agreements that are not even in dispute.

Proposed solution

The construction industry seeks to place responsibility for the cost of changes where it fairly belongs. The merits of the case should determine that responsibility, not onerous and unreasonable technical requirements that are often impossible to comply with.

Various legislative remedies have been introduced since 2003, and the important philosophical underpinning has to do with actual harm, or the legal term *material prejudice*. The proposed legislation would allow contractors to be compensated for unanticipated changes and those requested and approved by owners even if the contractors do not follow burdensome notice and/or claim-related documentation provisions to the letter unless the owner can show material prejudice as a result of the contractor’s noncompliance.

That is, if documentation supporting a claim is not provided by the contractor within a specified time period, but the missed deadline causes no harm to the owner, the contractor retains the right to seek an equitable adjustment. Owners are in the best position to know whether they have been materially prejudiced by a failure to comply with strict notice and documentation requirements. Otherwise, contractors are placed in the difficult position of trying to prove a negative, i.e., that owners were not materially prejudiced by noncompliance.

It is important to note that the University of Washington and the State Department of Enterprise Services – two of the State's largest public agencies – already provide for a prejudice showing in their contracts before the strict notice clause is enforceable. Most agencies and local governments are fair in their application of notice requirements. The construction industry believes legislation should require all public agencies to re-establish a balanced public policy for notice and claim disputes, a policy which benefits all stakeholders and taxpayers.

It is important to note that we have no desire to, and our remedy does not, eliminate notice provisions in contracts. Notices are a fundamental part of contract management. What we are trying to avoid are the opportunities that the Johnson case provides for agencies to sidestep the merits of a claim by reverting to the notice process AND presenting roadblocks to the contractor that are not even fairly theirs to overcome in providing notice.

Why now?

Prior legislative efforts were made immediately following the Court's ruling in Johnson when there was an absence of proof as to how the decision would affect the construction industry. Thirteen years later, there is consensus within the industry that construction costs have gone up, legitimate claims for additional payment have been lost and that notice and claim procedures have become more difficult and burdensome.

Examples of the need for the Fairness in Contracting Act

EXAMPLE 1 Weber Construction gave Spokane County a timely written notice of a claim, and the owner directed Weber to proceed with the extra work. Weber, however, lost its claim merely because it had not provided the County with the claim amount within the specified deadline. But Weber was unable to provide the claim amount because the County had not yet completed its design! The timing of the design was outside Weber's control. Weber ultimately won its case, but because of Johnson, it took years of costly appeals.

EXAMPLE 2 A public agency solicited bids for a project for construction of a levy to minimize flooding. During construction, the contractor discovers the project site had been used as an old garbage dump. The County orders the contractor to dig up the old garbage, put in trucks, and haul it to the County transfer station. The contractor requests a change order for the extra work. The County wrote back that it was studying the problem.

The cost to remove the old garbage depends on how much garbage was buried onsite. In this case, the contractor and the County could not determine how much work there would be until the old dump is excavated. The additional cost for the dump fee alone could have been \$2.8 million. The contractor cannot provide invoices, or the exact amount of the claim until after the quantity of garbage is determined.

The County's representative may well take the position that the County does not have to pay for any of the directed added work because the contractor failed to comply with the contract requirement to provide invoices within thirty days of "deemed denial of a Request for a Change Order." *Deemed denial* means if the County doesn't make a determination within thirty days of the request from the contractor for a change order, then the claim is treated as though the County had actually issued a decision denying the claim. It is this type of unfairness that our legislation is aimed at avoiding.

1-04.3 Reference Information

Reference Information provided to the Contractor is not part of the Contract. The Contracting Agency does not guarantee the accuracy of the Reference Information and is not responsible for the content of the Reference Information in any manner. Any use of Reference Information by the Contractor is done solely at the Contractor's risk.

1-04.4 Changes

The Engineer reserves the right to make, at any time during the Work, such changes in quantities and such alterations in the Work as are necessary to satisfactorily complete the project. Such changes in quantities and alterations shall not invalidate the Contract nor release the Surety, and the Contractor agrees to perform the Work as altered. Among others, these changes and alterations may include:

1. Deleting any part of the Work.
2. Increasing or decreasing quantities.
3. Altering Specifications, designs, or both.
4. Altering the way the Work is to be done.
5. Adding new Work.
6. Altering facilities, equipment, materials, services, or sites, provided by the Contracting Agency.
7. Ordering the Contractor to speed up or delay the Work.

The Engineer will issue a written change order for any change unless the remainder of this Section provides otherwise.

If the alterations or changes in quantities significantly change the character of the Work under the Contract, whether or not changed by any such different quantities or alterations, an adjustment, excluding loss of anticipated profits, will be made to the Contract. The basis for the adjustment shall be agreed upon prior to the performance of the Work. If a basis cannot be agreed upon, then an adjustment will be made either for or against the Contractor in such amount as the Engineer may determine to be fair and equitable. If the alterations or changes in quantities do not significantly change the character of the Work to be performed under the Contract, the altered Work will be paid for as provided elsewhere in the Contract. The term *significant change* shall be construed to apply only to the following circumstances:

- A. When the character of the Work as altered differs materially in kind or nature from that involved or included in the original proposed construction; or
- B. When an item of Work, as defined elsewhere in the Contract, is increased in excess of 125 percent or decreased below 75 percent of the original Contract quantity. For the purpose of this Section, an item of Work will be defined as any item that qualifies for adjustment under the provisions of [Section 1-04.6](#).

For item 1, an equitable adjustment for deleted Work will be made as provided in [Section 1-09.5](#).

For item 2, if the actual quantity of any item, exclusive of added or deleted amounts included in agreed change orders, increases or decreases by more than 25 percent from the original Plan quantity, the unit Contract prices for that item may be adjusted in accordance with [Section 1-04.6](#).

For any changes except item 1 (deleted Work) or item 2 (increasing or decreasing quantities), the Engineer will determine if the change should be paid for at unit Contract price(s). If the Engineer determines that the change increased or decreased the Contractor's costs or time to do any of the Work including unchanged Work, the Engineer will make an equitable adjustment to the Contract. The equitable adjustment will be by agreement with the Contractor. However, if the parties are unable to agree, the Engineer will determine the amount of the equitable adjustment in accordance with [Section 1-09.4](#) and adjust the time as the Engineer deems appropriate. Extensions of time will be evaluated in accordance with

Section 1-08.8. The Engineer's decision concerning equitable adjustment and extension of time shall be final as provided in **Section 1-05.1**.

The Contractor shall proceed with the Work upon receiving:

1. A written change order approved by the Engineer, or
2. An oral order from the Project Engineer before actually receiving the written change order.

Within 14 calendar days of delivery of the change order the contractor shall endorse and return the change order, request an extension of time for endorsement or respond in accordance with **Section 1-04.5**. The Contracting Agency may unilaterally process the change order if the Contractor fails to comply with these requirements. Changes normally noted on field stakes or variations from estimated quantities, except as provided in subparagraph A or B above, will not require a written change order. These changes shall be made at the unit prices that apply. The Contractor shall respond immediately to changes shown on field stakes without waiting for further notice.

The Contractor shall obtain written consent of the Surety or Sureties if the Engineer requests such consent.

1-04.4(1) Minor Changes

Payments or credits for changes amounting to \$25,000 or less may be made under the Bid item "Minor Change". At the discretion of the Contracting Agency, this procedure for Minor Changes may be used in lieu of the more formal procedure as outlined in **Section 1-04.4, Changes**.

The Contractor will be provided a copy of the completed order for Minor Change. The agreement for the Minor Change will be documented by signature of the Contractor, or notation of verbal agreement. If the Contractor is in disagreement with anything required by the order for Minor Change, the Contractor may protest the order as provided in **Section 1-04.5**.

Payments or credits will be determined in accordance with **Section 1-09.4**. For the purpose of providing a common Proposal for all Bidders, the Contracting Agency has entered an amount for "Minor Change" in the Proposal to become a part of the total Bid by the Contractor.

1-04.4(2) Value Engineering Change Proposal (VECP)

1-04.4(2)A General

A VECP is a Contractor proposed change to the Contract Provisions which will accomplish the projects functional requirements in a manner that is equal to or better than the requirements in the Contract. The VECP may be: (1) at a less cost or time, or (2) either no cost savings or a minor increase in cost with a reduction in Contract time. The net savings or added costs to the Contract Work are shared by the Contractor and Contracting Agency.

The Contractor may submit a VECP for changing the Plans, Specifications, or other requirements of the Contract. The Engineer's decision to accept or reject all or part of the proposal is final and not subject to arbitration under the arbitration clause or otherwise subject to litigation.

The VECP shall meet all of the following:

1. Not adversely affect the long term life cycle costs.
2. Not adversely impact the ability to perform maintenance.
3. Provide the required safety and appearance.
4. Provide substitution for deleted or reduced Disadvantaged Business Enterprise Condition of Award Work, Apprentice Utilization and Training.

VECPs that provide a time reduction shall meet the following requirements:

1. Time saving is a direct result of the VECP.
2. Liquidated damages penalties are not used to calculate savings.
3. Administrative/overhead cost savings experienced by either the Contractor or Contracting Agency as a result of time reduction accrue to each party and are not used to calculate savings.

1-04.4(2)B VECP Savings

1-04.4(2)B1 Proposal Savings

The incentive payment to the Contractor shall be one-half of the net savings of the proposal calculated as follows:

1. $(\text{gross cost of deleted work}) - (\text{gross cost of added work}) = (\text{gross savings})$
2. $(\text{gross savings}) - (\text{Contractor's engineering costs}) - (\text{Contracting Agency's costs}) = (\text{net savings})$
3. $(\text{net savings}) / 2 = (\text{incentive pay})$

The Contracting Agency's costs shall be the actual consultant costs billed to the Contracting Agency and in-house costs. Costs for personnel assigned to the Engineer's office shall not be included.

1-04.4(2)B2 Added Costs to Achieve Time Savings

The cost to achieve the time savings shall be calculated as follows:

1. $(\text{cost of added work}) + (\text{Contractor's engineering costs} - \text{Contracting Agency's engineering costs}) = (\text{cost to achieve time savings})$
2. $(\text{cost to achieve time savings}) / 2 = (\text{Contracting Agency's share of added cost})$

If the timesaving proposal also involves deleting work and, as a result, creates a savings for the Contracting Agency, then the Contractor shall also receive one-half of the savings realized through the deletion.

1-04.4(2)C VECP Approval

1-04.4(2)C1 Concept Approval

The Contractor shall submit a written proposal to the Engineer for consideration. The proposal shall contain the following information:

1. An explanation outlining the benefit provided by the change(s).
2. A narrative description of the proposed change(s). If applicable, the discussion shall include a demonstration of functional equivalency or a description of how the proposal meets the original contract scope of work.
3. A cost discussion estimating any net savings. Savings estimates will generally follow the outline below under the section, "Proposal Savings".
4. A statement providing the Contracting Agency with the right to use all or any part of the proposal on future projects without future obligation or compensation.
5. A statement acknowledging and agreeing that the Engineer's decision to accept or reject all or part of the proposal is final and not subject to arbitration under the arbitration clause or otherwise be subject to claims or disputes.
6. A statement giving the dates the Engineer must make a decision to accept or reject the conceptual proposal, the date that approval to proceed must be received, and the date the work must begin in order to not delay the contract. If the Contracting Agency does not approve the VECP by the date specified by the Contractor in their proposal the VECP will be deemed rejected.

7. The submittal will include an analysis on other Work that may have costs that changed as a result of the VECP. Traffic control and erosion control shall both be included in addition to any other impacted Work.

After review of the proposal, the Engineer will respond in writing with acceptance or rejection of the concept. This acceptance shall not be construed as authority to proceed with any change contract work. Concept approval allows the Contractor to proceed with the Work needed to develop final plans and other information to receive formal approval and to support preparation of a change order.

1-04.4(2)C2 Formal Approval

The Contractor's submittal to the Engineer for formal approval shall include the following:

1. Deleted Work – Include the calculated quantities of unit price Work to be deleted. Include the proposed partial prices for portions of lump sum Work deleted. For deletion of force account items include the time and material estimates.
2. Added Work – Include the calculated quantities of unit price Work to be added, either by original unit Contract prices or by new, negotiated unit prices. For new items of Work include the quantities and proposed prices.
3. Contractor's Engineering Costs – Submit the labor costs for the engineering to develop the proposal; costs for Contractor employees utilized in contract operations on a regular basis shall not be included.
4. Schedule Analysis – If the VECP is related to time savings, the Contractor shall submit a partial progress schedule showing the changed Work. The submittal shall also include a discussion comparing the partial progress schedule with the approved progress schedule for the project.
5. Working Drawings – Type 3 Working Drawings shall be submitted; those drawings which require engineering shall be a Type 3E.

Formal approval of the proposal will be documented by issuance of a change order. The VECP change order will contain the following statements which the Contractor agrees to by signing the change order:

1. The Contractor accepts design risk of all features, both temporary and permanent, of the changed Work.
2. The Contractor accepts risk of constructability of the changed Work.
3. The Contractor provides the Contracting Agency with the right to use all or any part of the proposal on future projects without further obligation or compensation.

VECP change orders will contain separate pay items for the items that are applicable to the Proposal. These are as follows:

1. Deleted Work.
2. Added Work.
3. The Contractor's engineering costs, reimbursed at 100 percent of the Contractor's cost.
4. Incentive payment to the Contractor.

When added Work costs exceed Deleted Work costs, but time savings make a viable proposal, then items 3 and 4 above are replaced with the following:

3. The Contracting Agency's share of added cost to achieve time savings.
4. The Contractor's share of savings from deleted Work.

1-04.4(2)C3 Authority to Proceed with Changed Work

The authority for the Contractor to proceed with the VECP Work will be provided by one of the following options:

1. Execution of the VECP change order, or
2. At the Contractor's request the Contracting Agency may provide approval by letter from the Engineer for the Work to proceed prior to execution of a change order. All of the risk for proceeding with the VECP shall be the responsibility of the Contractor. Additionally, the following criteria are required to have been met:
 - a. Concept approval has been granted by the Contracting Agency.
 - b. All design reviews and approvals have been completed, including plans and specifications.
 - c. The Contractor has guaranteed, in writing, the minimum savings to the Contracting Agency.

1-04.5 Procedure and Protest by the Contractor

The Contractor accepts all requirements of a change order by: (1) endorsing it, (2) writing a separate acceptance, (3) not responding within the allotted time as outlined in [Section 1-04.4](#), or (4) not protesting in the way this Section provides. A change order that is not protested as provided in this Section shall be full payment and final settlement of all claims for Contract time and for all costs of any kind, including costs of delays, related to any Work either covered or affected by the change. By not protesting as this Section provides, the Contractor also waives any additional entitlement and accepts from the Engineer any written or oral order (including directions, instructions, interpretations, and determinations).

If in disagreement with anything required in a change order, another written order, or an oral order from the Engineer, including any direction, instruction, interpretation, or determination by the Engineer, the Contractor shall:

1. Immediately give a signed written notice of protest to the Project Engineer or the Project Engineer's field Inspectors before doing the Work;
2. Supplement the written protest within 14 calendar days with a written statement and supporting documents providing the following:
 - a. The date and nature of the protested order, direction, instruction, interpretation or determination;
 - b. A full discussion of the circumstances which caused the protest, including names of persons involved, time, duration and nature of the Work involved, and a review of the Plans and Contract Provisions referenced to support the protest;
 - c. The estimated dollar cost, if any, of the protested Work and a detailed breakdown showing how that estimate was determined;
 - d. An analysis of the progress schedule showing the schedule change or disruption if the Contractor is asserting a schedule change or disruption; and
 - e. If the protest is continuing, the information required above shall be supplemented upon request by the Project Engineer until the protest is resolved.

Throughout any protested Work, the Contractor shall keep complete records of extra costs and time incurred. The Contractor shall permit the Engineer access to these and any other records related to the protested Work as determined by the Engineer.

The Engineer will evaluate all protests provided the procedures in this Section are followed. If the Engineer determines that a protest is valid, the Engineer will adjust payment for Work or time by an equitable adjustment in accordance with [Section 1-09.4](#). Extensions of time will be evaluated in accordance with [Section 1-08.8](#). No adjustment will be made for an invalid protest.

If the Engineer determines that the protest is invalid, that determination and the reasons for it will be provided in writing to the Contractor. The determination will be provided within 14 calendar days after receipt of the Contractor's supplemental written statement (including any additional information requested by the Project Engineer to support a continuing protest) described in item 2 above.

If the Contractor does not accept the Engineer's determination then the Contractor shall pursue the dispute and claims procedures set forth in Section 1-09.11. In spite of any protest or dispute, the Contractor shall proceed promptly with the Work as the Engineer orders.

By failing to follow the procedures of Sections 1-04.5 and 1-09.11, the Contractor completely waives any claims for protested Work. *(insert "to the extent the owner was prejudiced")*

1-04.6 Variation in Estimated Quantities

Payment to the Contractor will be made only for the actual quantities of Work performed and accepted in conformance with the Contract. When the accepted quantity of Work performed under a unit item varies from the original Proposal quantity, payment will be at the unit Contract price for all Work unless the total accepted quantity of any Contract item, adjusted to exclude added or deleted amounts included in change orders accepted by both parties, increases or decreases by more than 25 percent from the original Proposal quantity. In that case, payment for Contract Work may be adjusted as described herein.

The adjusted final quantity shall be determined by starting with the final accepted quantity measured after all Work under an item has been completed. From this amount, subtract any quantities included in additive change orders accepted by both parties. Then, to the resulting amount, add any quantities included in deductive change orders accepted by both parties. The final result of this calculation shall become the adjusted final quantity and the basis for comparison to the original Proposal quantity.

1. **Increased Quantities** – Either party to the Contract will be entitled to renegotiate the price for that portion of the adjusted final quantity in excess of 1.25 times the original Proposal quantity. The price for excessive increased quantities will be determined by agreement of the parties, or, where the parties cannot agree, the price will be determined by the Engineer based upon the actual costs to perform the Work, including reasonable markup for overhead and profit.
2. **Decreased Quantities** – Either party to the Contract will be entitled to an equitable adjustment if the adjusted final quantity of Work performed is less than 75 percent of the original Bid quantity. The equitable adjustment shall be based upon and limited to three factors:
 - a. Any increase or decrease in unit costs of labor, materials or equipment, utilized for Work actually performed, resulting solely from the reduction in quantity;
 - b. Changes in production rates or methods of performing Work actually done to the extent that the nature of the Work actually performed differs from the nature of the Work included in the original plan; and
 - c. An adjustment for the anticipated contribution to unavoidable fixed cost and overhead from the units representing the difference between the adjusted final quantity and 75 percent of the original Plan quantity.

The following limitations shall apply to renegotiated prices for increases and/or equitable adjustments for decreases:

1. The equipment rates shall be actual cost but shall not exceed the rates set forth in the AGC/WSDOT Equipment Rental Agreement (referred to in Section 1-09.6) that is in effect at the time the Work is performed.
2. No payment will be made for extended or unabsorbed home office overhead and field overhead expenses to the extent that there is an unbalanced allocation of such expenses among the Contract Bid items.

3. No payment for consequential damages or loss of anticipated profits will be allowed because of any variance in quantities from those originally shown in the Proposal form, Contract Provisions, and Contract Plans.
4. The total payment (including the adjustment amount and unit prices for Work performed) for any item that experiences an equitable adjustment for decreased quantity shall not exceed 75 percent of the amount originally Bid for the item.

If the adjusted final quantity of any item does not vary from the quantity shown in the Proposal by more than 25 percent, then the Contractor and the Contracting Agency agree that all Work under that item will be performed at the original Contract unit price.

When ordered by the Engineer, the Contractor shall proceed with the Work pending determination of the cost or time adjustment for the variation in quantities.

The Contractor and the Contracting Agency agree that there will be no cost adjustment for decreases if the Contracting Agency has entered the amount for the item in the Proposal form only to provide a common Proposal for Bidders.

1-04.7 Differing Site Conditions (Changed Conditions)

During the progress of the Work, if preexisting subsurface or latent physical conditions are encountered at the site, differing materially from those indicated in the Contract, or if preexisting unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the Work provided for in the Contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing site conditions before they are disturbed and before the affected Work is performed.

Upon written notification, the Engineer will investigate the conditions and if he/she determines that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any Work under the Contract, an adjustment, excluding loss of anticipated profits, will be made and the Contract modified in writing accordingly. The Engineer will notify the Contractor of his/her determination whether or not an adjustment of the Contract is warranted.

No Contract adjustment which results in a benefit to the Contractor will be allowed unless the Contractor has provided the required written notice.

The equitable adjustment will be by agreement with the Contractor. However, if the parties are unable to agree, the Engineer will determine the amount of the equitable adjustment in accordance with [Section 1-09.4](#). Extensions of time will be evaluated in accordance with [Section 1-08.8](#).

If the Engineer determines that different site conditions do not exist and no adjustment in costs or time is warranted, such determination shall be final as provided in [Section 1-05.1](#).

If there is a decrease in the costs or time required to perform the Work, failure of the Contractor to notify the Engineer of the differing site conditions shall not affect the Contracting Agency's right to make an adjustment in the costs or time.

No claim by the Contractor shall be allowed unless the Contractor has followed the procedures provided in [Sections 1-04.5](#) and [1-09.11](#).

1-04.8 Progress Estimates and Payments

Engineer-issued progress estimates or payments for any part of the Work shall not be used as evidence of performance or quantities. Progress estimates serve only as basis for partial payments. The Engineer may revise progress estimates any time before final acceptance. If the Engineer deems it proper to do so, changes may be made in progress estimates and in the final estimate.

The Contractor shall submit five copies of a Type A or Type B Schedule Update within 15 calendar days of receiving a written request, or when an update is required by any other provision of the Contract. A "significant" delay in time is defined as 10 working days or 10 percent of the original Contract time, whichever is greater.

In addition to the other requirements of this Section, Schedule Updates shall reflect the following information:

1. The actual duration and sequence of as-constructed Work activities, including changed Work.
2. Approved time extensions.
3. Any construction delays or other conditions that affect the progress of the Work.
4. Any modifications to the as-planned sequence or duration of remaining activities.
5. The Physical Completion of all remaining Work in the remaining Contract time.

Unresolved requests for time extensions shall be reflected in the Schedule Update by assuming no time extension will be granted, and by showing the effects to follow-on activities necessary to physically complete the project within the currently authorized time for completion.

1-08.3(4) Measurement

No specific unit of measurement shall apply to the lump sum item for Type B Progress Schedule.

1-08.3(5) Payment

Payment will be made for the following Bid item when it is included in the Proposal: "Type B Progress Schedule", lump sum.

The lump sum price shall be full pay for all costs for furnishing the Type B Progress Schedule and preliminary Type B Progress Schedule.

Payment of 80 percent of the lump sum price will be made upon approval of the Progress Schedule.

Payment will be increased to 100 percent of the lump sum price upon completion of 80 percent of the original total Contract Award amount.

All costs for providing Type A Progress Schedules and Weekly Look Ahead Schedules are considered incidental to other items of Work in the Contract.

No payment will be made for Schedule Updates that are required due to the Contractors operations. Schedule Updates required by events that are attributed to the actions of the Contracting Agency will be paid for in accordance with [Section 1-09.4](#).

1-08.4 Prosecution of Work

The Contractor shall begin Work within 21 calendar days from the date of execution of the Contract by the Contracting Agency, unless otherwise approved in writing. The Contractor shall diligently pursue the Work to the Physical Completion Date within the time specified in the Contract. Voluntary shutdown or slowing of operations by the Contractor shall not relieve the Contractor of the responsibility to complete the Work within the time(s) specified in the Contract.

When shown in the Plans, the first order of work shall be the installation of high visibility fencing to delineate all areas for protection or restoration, as described in the Contract. Installation of high visibility fencing adjacent to the roadway shall occur after the placement of all necessary signs and traffic control devices in accordance with [Section 1-10.1\(2\)](#). Upon construction of the fencing, the Contractor shall request the Engineer to inspect the fence. No other work shall be performed on the site until the Contracting Agency has accepted the installation of high visibility fencing, as described in the Contract.

1-08.5 Time for Completion

The Contractor shall complete all physical Contract Work within the number of “working days” stated in the Contract Provisions or as extended by the Engineer in accordance with [Section 1-08.8](#). Every day will be counted as a “working day” unless it is a nonworking day or an Engineer determined unworkable day. A nonworking day is defined as a Saturday, a Sunday, a whole or half day on which the Contract specifically prohibits Work on the critical path of the Contractor’s approved progress schedule, or one of these holidays: January 1, the third Monday of January, the third Monday of February, Memorial Day, July 4, Labor Day, November 11, Thanksgiving Day, the day after Thanksgiving, and Christmas Day. When any of these holidays fall on a Sunday, the following Monday shall be counted a nonworking day. When the holiday falls on a Saturday, the preceding Friday shall be counted a nonworking day. The days between December 25 and January 1 will be classified as nonworking days.

An unworkable day is defined as a half or whole day the Engineer declares to be unworkable because of weather or conditions caused by the weather that prevents satisfactory and timely performance of the Work shown on the critical path of the Contractor’s approved progress schedule. Other conditions beyond the control of the Contractor may qualify for an extension of time in accordance with [Section 1-08.8](#).

Contract time shall begin on the first working day following the 21st calendar day after the date the Contracting Agency executes the Contract. If the Contractor starts Work on the project at an earlier date, then Contract time shall begin on the first working day when on-site Work begins. The Contract Provisions may specify another starting date for Contract time, in which case, time will begin on the starting date specified.

Each working day shall be charged to the Contract as it occurs, until the Contract Work is physically complete. If Substantial Completion has been granted and all the authorized working days have been used, charging of working days will cease. Each week the Engineer will provide the Contractor a statement that shows the number of working days: (1) charged to the Contract the week before; (2) specified for the Physical Completion of the Contract; and (3) remaining for the Physical Completion of the Contract. The statement will also show the nonworking days and any half or whole day the Engineer declares as unworkable. Within 10 calendar days after the date of each statement, the Contractor shall file a written protest of any alleged discrepancies in it. To be considered by the Engineer, the protest shall be in sufficient detail to enable the Engineer to ascertain the basis and amount of time disputed. By not filing such detailed protest in that period, the Contractor shall be deemed as having accepted the statement as correct.

The Engineer will give the Contractor written notice of the Physical Completion Date for all Work the Contract requires. That date shall constitute the Physical Completion Date of the Contract, but shall not imply the Secretary’s acceptance of the Work or the Contract.

The Engineer will give the Contractor written notice of the Completion Date of the Contract after all the Contractor’s obligations under the Contract have been performed by the Contractor. The following events must occur before the Completion Date can be established:

1. The physical Work on the project must be complete; and
2. The Contractor must furnish all documentation required by the Contract and required by law, to allow the Contracting Agency to process final acceptance of the Contract. The following documents must be received by the Project Engineer prior to establishing a Completion Date:
 - a. Certified Payrolls (Federal-aid Projects)
 - b. Material Acceptance Certification Documents
 - c. Quarterly Reports of Amounts Paid as MBE/WBE Participants, or Quarterly Reports of Amounts Credited as DBE Participation, as required by the Contract Provisions
 - d. Final Contract Voucher Certification
 - e. Copies of the approved “Affidavit of Prevailing Wages Paid” for the Contractor and all Subcontractors

1-08.6 Suspension of Work

The Engineer may order suspension of all or any part of the Work if:

1. Unsuitable weather prevents satisfactory and timely performance of the Work; or
2. The Contractor does not comply with the Contract; or
3. It is in the public interest.

When ordered by the Engineer to suspend or resume Work, the Contractor shall do so immediately.

If the Work is suspended for reason (1) above, the period of Work stoppage will be counted as unworkable days. But if the Engineer believes the Contractor should have completed the suspended Work before the suspension, all or part of the suspension period may be counted as working days. The Engineer will set the number of unworkable days (or parts of days) by deciding how long the suspension delayed the entire project.

If the Work is suspended for reason (2) above, the period of Work stoppage will be counted as working days. The lost Work time, however, shall not relieve the Contractor from any Contract responsibility.

If the performance of all or any part of the Work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Contracting Agency in the administration of the Contract, or by failure to act within the time specified in the Contract (or if no time is specified, within a reasonable time), the Engineer will make an adjustment for any increase in the cost or time for the performance of the Contract (excluding profit) necessarily caused by the suspension, delay, or interruption. However, no adjustment will be made for any suspension, delay, or interruption if (1) the performance would have been suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or (2) an equitable adjustment is provided for or excluded under any other provision of the Contract.

If the Contractor believes that the performance of the Work is suspended, delayed, or interrupted for an unreasonable period of time and such suspension, delay, or interruption is the responsibility of the Contracting Agency, the Contractor shall immediately submit a written notice of protest to the Engineer as provided in Section 1-04.5. No adjustment shall be allowed for any costs incurred more than 10 calendar days before the date the Engineer receives the Contractor's written notice of protest. If the Contractor contends damages have been suffered as a result of such suspension, delay, or interruption, the protest shall not be allowed unless the protest (stating the amount of damages) is asserted in writing as soon as practicable, but no later than the date of the Contractor's signature on the Final Contract Voucher Certification. The Contractor shall keep full and complete records of the costs and additional time of such suspension, delay, or interruption and shall permit the Engineer to have access to those records and any other records as may be deemed necessary by the Engineer to assist in evaluating the protest.

The Engineer will determine if an equitable adjustment in cost or time is due as provided in this Section. The equitable adjustment for increase in costs, if due, shall be subject to the limitations provided in Section 1-09.4, provided that no profit of any kind will be allowed on any increase in cost necessarily caused by the suspension, delay, or interruption.

Request for extensions of time will be evaluated in accordance with Section 1-08.8.

The Engineer's determination as to whether an adjustment should be made will be final as provided in Section 1-05.1.

No claim by the Contractor under this clause shall be allowed unless the Contractor has followed the procedures provided in this Section and in Sections 1-04.5 and 1-09.11.

1-08.7 Maintenance During Suspension

Before and during any suspension (as described in Section 1-08.6) the Contractor shall protect the Work from damage or deterioration. Suspension shall not relieve the Contractor from anything the Contract requires unless this Section states otherwise.

*different day
count vs
14 DAYS*

At no expense to the Contracting Agency, the Contractor shall provide through the construction area safe, smooth, and unobstructed roadways and pedestrian access routes for public use during the suspension (as required in [Section 1-07.23](#) or the Special Provisions). This may include a temporary road, alternative pedestrian access route or detour.

If the Engineer determines that the Contractor failed to pursue the Work diligently before the suspension, or failed to comply with the Contract or orders, then the Contractor shall maintain the temporary Roadway in use during suspension. In this case, the Contractor shall bear the maintenance costs. If the Contractor fails to maintain the temporary Roadway, the Contracting Agency will do the Work and deduct all resulting costs from payments due to the Contractor.

If the Engineer determines that the Contractor has pursued the Work diligently before the suspension, then the Contracting Agency will maintain the temporary Roadway (and bear its cost). This Contracting Agency-provided maintenance work will include only routine maintenance of:

1. The Traveled Way, Auxiliary Lanes, Shoulders, and detour surface;
2. Roadway drainage along and under the traveled Roadway or detour; and
3. All barricades, signs, and lights needed for directing traffic through the temporary Roadway or detour in the construction area.

The Contractor shall protect and maintain all other Work in areas not used by traffic. All costs associated with protecting and maintaining such Work shall be the responsibility of the Contractor except those costs associated with implementing the TESC Plan according to [Section 8-01](#).

After any suspension during which the Contracting Agency has done the routine maintenance, the Contractor shall accept the traveled Roadway or detour as is when Work resumes. The Contractor shall make no claim against the Contracting Agency for the condition of the Roadway or detour.

After any suspension, the Contractor shall resume all responsibilities the Contract assigns for the Work.

1-08.8 Extensions of Time

The Contractor shall submit any requests for time extensions to the Engineer in writing no later than 10 working days after the delay occurs. The requests for time extension shall be limited to the effect on the critical path of the Contractor's approved schedule attributable to the change or event giving rise to the request.

To be considered by the Engineer, the request shall be in sufficient detail (as determined by the Engineer) to enable the Engineer to ascertain the basis and amount of the time requested. The request shall include an updated schedule that supports the request and demonstrates that the change or event: (1) had a specific impact on the critical path, and except in cases of concurrent delay, was the sole cause of such impact, and (2) could not have been avoided by resequencing of the Work or by using other reasonable alternatives. If a request combined with previous extension requests, equals 20 percent or more of the original Contract time then the Contractor's letter of request must bear consent of Surety. In evaluating any request, the Engineer will consider how well the Contractor used the time from Contract execution up to the point of the delay and the effect the delay has on any completion times included in the Special Provisions. The Engineer will evaluate and respond within 15 calendar days of receiving the request.

The authorized time for Physical Completion will be extended for a period equal to the time the Engineer determines the Work was delayed because of:

1. Adverse weather causing the time requested to be unworkable, provided that the Engineer had not already declared the time to be unworkable and the Contractor has filed a written protest according to [Section 1-08.5](#).